No. 161

In the Supreme Court of the United States

OCTOBER TERM, 1944

NATIONAL METROPOLITAN BANK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The judgment of the District Court of the United States for the District of Columbia (R. 19–20) was entered without opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 25–29) is reported in 142 F. (2d) 474.

JURISDICTION

The judgment of the Court of Appeals was entered May 1, 1944 (R. 30). The petition for a writ of certiorari was filed June 14, 1944, and was granted October 9, 1944 (R. 31). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

A vouchering clerk of the United States during a period of 28 months fraudulently procured the issuance of checks to the order of existing payees, purloined the checks, forged the payees' signatures as endorsements, and cashed the checks at a bank which thereafter endorsed and transmitted them to petitioner bank. Petitioner endorsed the checks, explicitly guaranteeing prior endorsements, collected the proceeds from the United States and transmitted them to the cashing bank. The question presented is whether failure of the United States to exercise diligence to prevent or discover the fraud and the forgeries bars recovery from petitioner of the amount thus paid to it.[1]

STATEMENT

On August 11, 1942, the United States instituted suit against petitioner in the District Court of the United States for the District of Columbia, seeking

[1] A second question was raised by the petition for certiorari (p. 6), namely, whether the United States, having given petitioner prompt notice of the discovery of the forgery and having promptly demanded repayment, is nevertheless barred from recovery because of delay in instituting suit. This has apparently been abandoned by petitioner since it is neither specified as an error (Pet. Br. pp. 4–5) nor argued in its brief. In any event, the question lacks merit. *Restatement of Agency*, Section 439; *Federal Reserve Bank* v. *Atlanta Trust Co.*, 91 F. (2d) 283 (C. C. A. 5), certiorari denied, 302 U. S. 738. Cf. *Hidalgo Steel Co.* v. *Moore & McCormack Co.*, 298 Fed. 331, 334 (S. D. N. Y.); *Guarantee Title & Trust Co.* v. *Viola State Bank*, 124 Kans. 776.

to recover $18,060.83, with interest, which the Treasurer of the United States had paid to petitioner upon 144 checks bearing the forged signatures of the payees (R. 1–6). Petitioner answered (R. 6–17, 17–18) and the United States moved for judgment on the pleadings (R. 19). The facts as disclosed by the pleadings are substantially as follows:[2]

James H. Foley, a civilian clerk in the Office of the Paymaster, United States Marine Corps, Headquarters, Washington, D. C., was officially assigned to prepare Marine officers' pay and travel vouchers, to prepare checks payable to such officers in payment of such vouchers, to present the checks for signature by the Marine Corps paymaster or other disbursing officers duly authorized to draw checks on the Treasurer of the United States, and to deliver the signed checks to the named payees (R. 8, 12–13, 16). From time to time during a period of 28 months beginning shortly before July 14, 1936, and ending November 16, 1938, Foley forged pay and travel vouchers, together with the necessary supporting travel orders, and prepared 144 checks drawn on the Treasurer of the United States in the amounts set forth in the forged vouchers (R. 7–8). The checks and vouchers were payable to each of 16 actually

[2] The legal conclusions set forth in petitioner's answer (R. 6–18), many of which are reproduced in its petition for certiorari (pp. 3–5), were, of course, not admitted by the motion for judgment on the pleadings.

existing Marine Corps officers, many of whom were stationed in Washington, D. C., and none of whom was entitled to the proceeds of any of the checks or had any knowledge of the fraud (R. 8). Foley took the checks, vouchers, and travel orders he thus prepared and, without any intervening administrative scrutiny, presented them to the Marine Corps paymaster or other authorized disbursing officers (R. 8, 11–12). The paymaster and disbursing officers were unaware of the fraud and, relying exclusively on Foley's established reputation for honesty and integrity, they signed each of the checks in good faith without verifying the vouchers or travel orders (R. 8–9). Records and accounts of the Marine Corps existed which, if examined with care and diligence, would have disclosed the fraud in the issuance of the checks and the subsequent forgeries of their endorsements (R. 13, 17).

The paymaster or other disbursing officer returned the signed checks, vouchers, and orders to Foley for filing and distribution (R. 9). Foley did not deliver the checks to any of the 16 officers named as payees but forged the payee's signature as an endorsement on each check, added his own name as second endorser, and cashed or deposited the checks in his account at the Anacostia Bank of Anacostia, D. C. (R. 8–9). The Anacostia Bank made no investigation of the genuineness of the payees' signatures but took the checks in reliance upon its confidence in its depositor Foley (R. 9).

The Anacostia Bank then endorsed each of the checks "Pay to the order of any Bank, Banker or Trust Company. Prior endorsements guaranteed," and transmitting them to petitioner bank for collection. Petitioner in turn endorsed the checks with the same guarantee of "prior endorsements," and presented them to the Treasurer of the United States for payment (R. 9–10). The Treasurer paid the amount of the checks to petitioner (R. 9), which credited and later paid the collections to the Anacostia Bank (R. 10–11).

Thereafter, in November 1938, the Government discovered the fraud and the forgeries from the examination of its accounts and records (R. 7–8), and on December 8, 1938, made formal demand upon petitioner for repayment (R. 6), which was refused. Action was brought by the United States on August 11, 1942, to recover the payments (R. 1), the complaint consisting of a count for money paid by mistake (R. 1–2), and a count for breach of an express warranty (R. 2–3).

The District Court granted the motion of the United States for judgment on the pleadings (R. 19–20), and the United States Court of Appeals for the District of Columbia affirmed (R. 30).

SUMMARY OF ARGUMENT

There is unquestioned here the basic rule that the drawee who pays a check upon the forged endorsement of the payee may recover from the one who receives payment, for such payment has

been made in mistaken reliance upon the representation of the presenter that he has title. Petitioner seeks to exclude this case from that rule on the ground that as an agent for the cashing bank it retained no benefit from the transaction, and that the United States was negligent in issuing the check and in discovering the forgery. Neither ground is tenable.

I. While a disclosed agent may in some circumstances evade liability to return money received on a forged endorsement, as where the proceeds had been transmitted to the principal, that defense cannot be invoked by an undisclosed agent. Petitioner did not disclose to the United States by its endorsement on the checks, that it was a collecting agent for another bank. All the elements of a right in the United States to recover money paid under a mistake of fact are therefore present. The right of recovery is even clearer under the second count of the complaint, for breach of an express guarantee as to the genuineness of prior signatures. Such a form of endorsement originated to avoid controversy as to liability of the collecting bank; the disposition made by it of the collected proceeds is immaterial since its express contractual undertaking has been broken.

II. A drawer-drawee, such as the United States in the case at bar, owes no duty to persons volunteering to cash or collect checks, to protect them against fraudulent issuance of the check or the

consequent forgery of the payee's signature thereon. The Federal courts almost without exception have held that the drawer's negligence in failing to prevent or discover fraud in the issuance of checks or to discover the subsequent forgery of the payee's signature does not bar recovery, and the great weight of state authority is in accord. This Court applied that rule in *United States* v. *National Exchange Bank*, 214 U. S. 302. It is only when conduct of the drawer or drawee affirmatively misleads the cashing or presenting bank that the right of recovery may be defeated by estoppel. Here there can be no contention that the Government misled petitioner; and there was no representation by the Government, in fact or in law, that the payee had endorsed the checks. That issuance of the checks was induced by the fraud of the drawer's employee has likewise uniformly been rejected as a defense to an action for repayment, and efforts to amend the Negotiable Instruments Law to recognize such a defense have thus far been successful only in a handful of states.

The rule that the drawer owes no duty to the cashing or presenting bank is grounded on sound policy. The bank need not accept a check; and before it does it can assure itself of the validity of the instrument or the responsibility of the endorser who tenders it. As a matter of banking practice, the cashing or collecting bank is not concerned with, and does not inquire into the circumstances under

which the check was issued; it can safely cash a check only on the assumption that the one with whom it deals will make it good if necessary. Consequently, to afford the bank a defense against repayment because of circumstances which played no part in its determination to take the check, would give it a windfall. At the same time, such a rule would diminish the desirability of negotiable paper to drawers and cut into its wide use as a safe medium of payment. In view of the ease with which banks may protect themselves against forgery, the great weight of authority has wisely declined to encumber negotiable paper with a defense that hinges upon subsequent evaluation of the drawer's conformance to standards of care.

The decision in *United States* v. *Chase National Bank*, 252 U. S. 485, is not in point since that involved the forgery of the drawer's signature on a check payable to the drawer; under the exceptional doctrine of *Price* v. *Neal*, 3 Burr. 1354, the drawee is charged with the drawer's signature and cannot recover if that proves to be forged. That the payee's signature was also forged in the *Chase Bank* case does not make the decision applicable here, for since drawer and payee were the same, the drawee's chargeability with the drawer's signature could be extended to that of the payee. The decision of the Seventh Circuit Court of Appeals in *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681, is out of line with the

great weight of authority and should be disapproved.

ARGUMENT

Certain undisputed principles underlie all suits to recover payments made upon a check bearing a forged endorsement. The drawer who calls upon the drawee to pay to the order of a named payee expects that payment will be made only as ordered; if the payee's endorsement is forged and the instrument is paid by the drawee to the forger or to an innocent transferee, the drawee has not paid according to the directions of his drawer and may not charge the latter's account.[3] The drawee, who paid the check in reliance upon the presenter's express or implied representation that he could give a valid discharge because title to the instrument had properly vested in him, may in turn recover from the presenter the money thus paid without consideration and under a mistake of fact, even though the latter is innocent of wrong.[4] And this right of recovery

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[3] *Farmers' State Bank* v. *United States*, 62 F. (2d) 178 (C. C. A. 5); see *First Nat. Bank* v. *Whitman*, 94 U. S. 343, 346–347; *Leather Manf.' Bank* v. *Merchants' Bank*, 128 U. S. 26, 34; Brannan, *Negotiable Instr. Law* (6th ed. 1938), p. 327.

[4] *Leather Manf.' Bank* v. *Merchants' Bank*, *supra*; *Insurance Co.* v. *Fourth Nat. Bank*, 12 F. (2d) 100 (N. D. Ga.); 28 F. (2d) 933 (C. C. A. 5), certiorari denied, 279 U. S. 853; *Continental Nat. Bank & Trust Co.* v. *Olney Nat. Bank*, 33 F. (2d) 437 (C. C. A. 7); Brannan, *op. cit. supra*, pp. 329–331.

against the presenter exists where the drawer and drawee are the same, for example, two agencies of the United States, as is the case here.[5]

These unchallenged rules would require judgment for the United States for the amount which it had paid to petitioner upon the 144 checks bearing forged endorsements of the payees. Petitioner, however, argues that an exception must be made here (1) because as a collecting agent for the Anacostia Bank petitioner turned over all the proceeds of the checks to the latter, and has not profited financially by the transaction, and (2) because the Government was negligent in not preventing or discovering the fraud and the forgeries before making payment to petitioner. These contentions, we submit, were properly rejected below. Petitioner also argues here, apparently for the first time, (3) that recovery should be denied because the checks were "false" and incapable of a genuine endorsement. This contention is equally without substance.

I

PETITIONER'S STATUS AS UNDISCLOSED AGENT FOR THE ANACOSTIA BANK DOES NOT BAR RECOVERY

Petitioner urges that the present action, being in essence one for restitution, should be governed by equitable principles; and that since petitioner as a collecting bank acted in good faith and turned

[5] *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 368; *United States* v. *National Exchange Bank*, 214 U. S. 302.

all the proceeds over to the cashing bank, it does not retain any money against good conscience (Br. pp. 11, 12). We submit that these considerations cannot prevail over the petitioner's implied warranty of good title to the instruments and its express guarantee of the genuineness of prior endorsements, both of which were broken.

The Government's complaint in the District Court comprised two counts—one for money paid by mistake, and the other for breach of an express guaranty (R. 1–3). Under the applicable principles, petitioner's status as an undisclosed collecting bank does not bar recovery on either count.[6]

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[6] Rights and obligations of the United States in fiscal matters arise under the Constitution and statutes and are determined by federal, not local law. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366; *United States* v. *Allegheny County*, 322 U. S. 174, 184; cf. *Irvine* v. *Marshall*, 20 How. 558, 563; *United States* v. *Robeson*, 9 Pet. 319, 325. In fashioning a uniform federal rule of decision in respect of the Government's negotiable paper, resort may be had to the law merchant developed under the regime of *Swift* v. *Tyson*, 16 Pet. 1, by the federal courts (*Clearfield Trust Co.* v. *United States*, *supra*, at 367) and to other usual common-law sources (*Smith* v. *Alabama*, 124 U. S. 465, 478; cf. *D'Oench, Duhme & Co.* v. *F. D. I. C.*, 315 U. S. 447, 468; *Board of Commissioners* v. *United States*, 308 U. S. 343, 350). This federal rule of decision remains applicable, despite *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, to rights and liabilities of the United States arising from Government checks. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 366–367. Policies settled under federal authority may not be defeated or limited by local law. *United States* v. *Allegheny County*, *supra*, at p. 183; *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176. It has not yet been determined what effect is to be given the

There are present here all the requisite elements for recovery of money paid under a mistake of fact: Petitioner by presenting the checks and receiving payment thereon warranted, both impliedly and expressly, that it had title to the paper; but since the signatures of the payees had been forged, it had no title and the drawee paid out funds under a misrepresentation of an essential fact.[1] See *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 368–369. It has been the settled

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N. I. L. and other uniform laws in transactions involving the United States. (Cf. *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, 496; *Commercial National Bank* v. *Canal Bank*, 239 U. S. 520, 528–529; *Kobey* v. *Hoffman*, 229 Fed. 486, 488–489 (C. C. A. 8)). The court below relied in part, however, on D. C. Code, 1940 § 28–124, which reproduces section 23 of the Uniform Negotiable Instruments Law and provides that a forged signature "is wholly inoperative" and that no right to give a discharge for the instrument can be acquired thereby (R.). Since the federal rule and the statute of the District of Columbia as construed by its courts are identical, there is no need in the instant case to determine the weight to be given to local law.

[1] The situation, as regards recovery against the presenter, is strikingly analogous to an action for fraud. There is a misrepresentation of a material fact: made falsely (if the check is presented by a guilty party) or as a positive assertion without knowledge of its truth or falsity; intended to be acted upon; and acted upon with resultant loss. Cf. *Denning & Co.* v. *Sunerest Lumber Co.*, 51 F. (2d) 945, 948 (C. C. A. 4); *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 112 F. (2d) 302, 308 (C. C. A. 7), reversed on other grounds, 312 U. S. 410; *Hackner* v. *Morgan*, 130 F. (2d) 300, 302 (C. C. A. 2). The element of "scienter" is supplied through the express guarantee of the genuineness of the payee's en-

federal rule that in such circumstances recovery may be had from the collecting bank in an action for money had and received, unless the drawee is estopped from asserting the forgery by reason of some positive misrepresentation which misled the presenting bank to its detriment. *Leather Manf.' Bank* v. *Merchants' Bank*, 128 U. S. 26, 34; *United States* v. *National Exchange Bank*, 214 U. S. 302, 311; Woodward, *Quasi Contracts* (1913) § 80; cf. *Espy* v. *Bank of Cincinnati*, 18 Wall. 604. Here there was no representation by the United States that the payee's signatures were genuine, nor any other assurance contrary to the fact. The only representations were those inherent in any check: that the drawee would pay upon order of the named payee.

The agency status of the collecting bank and its obligation to turn the money over to the forwarder become material only when those facts are clearly disclosed to the drawee; as for example where the paper has been endorsed "for collection." In such a case, recovery may be had only when the collecting bank retains in its possession money of its principal. *Wells, Fargo & Co.* v. *United States*, 45 Fed. 337, 340 (N. D. Cal.); *National Park Bank* v. *Seaboard Bank*, 114 N. Y. 28. Here petitioner did not disclose that it was acting as an agent, and the endorsements which it and the

dorsement, without any knowledge whatsoever of its truth or falsity. Cf. *Lehigh Zinc & Iron Co.* v. *Bamford*, 150 U. S. 665, 673; *Smith* v. *Richards*, 13 Pet. 26, 36.

Anacostia Bank placed upon the paper did not indicate any such status. Accordingly, petitioner cannot take advantage of the fact that it was acting as a collecting agent. *Philadelphia National Bank* v. *Fulton National Bank*, 25 F. (2d) 995, 996 (N. D. Ga.); *National Bank of Commerce* v. *Bossemeyer*, 101 Neb. 96; *Interstate Trust Co.* v. *United States National Bank*, 67 Colo. 6.

B. BREACH OF AN EXPRESS WRITTEN GUARANTY

The limited and conditional liability of a collecting bank which acted as a disclosed agent for a forwarding bank inevitably gave rise to the difficulties of establishing the fact of agency as well as whether at the time of suit it had funds of the forwarding bank in its possession. In order to obviate dispute as to liability in case of a forged endorsement, the New York Clearing House in 1896 required collecting banks expressly to guarantee prior endorsements, and this procedure gradually spread to other clearing houses throughout the country. See 13 *Banking Law Journal* (1896) 293, 445; 21 *id.* (1904) 99, 217, 246; *First Nat. Bank of Belmont* v. *First Nat. Bank of Barnesville*, 58 Ohio St. 207. As a result, a collecting bank which so endorsed checks presented for payment was as fully liable to the drawee if the payee's signature proved to have been forged, as was the cashing bank. *District Nat. Bank* v. *Washington Loan & Trust Co.*, 65 F. (2d) 831 (App. D. C.);

McKinnon v *Boardman*, 170 Fed. 920 (C. C. A. 2).

The United States always avails itself of the protection of this form of endorsement, as it did here. Petitioner endorsed each of the checks in suit "Pay to the order of any Bank, Banker or Trust Co. Prior endorsements guaranteed," before it presented the checks to the Treasury for payment (R. 9), and such an endorsement has become a *sine qua non* to payment of Government checks. As this Court noted in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 365, Treasury regulations (31 C. F. R. 202.33) require all banks to endorse a guarantee of "prior endorsements" on Government checks presented for payment to Federal Reserve Banks or member bank depositories; and the uniform practice has been not to pay Government checks at the Treasury of the United States to an endorsee without such an endorsement (see Appendix, p. 43, *infra*).[*] The purpose of these requirements is to make the presenting bank absolutely responsible for the genuineness of the payee's endorsement and to enable recovery to be had directly from the presenting bank where that endorsement was forged, without regard to whether the bank was agent or principal. Cf. *Philadelphia National Bank* v. *Fulton National Bank*, 25 F. (2d) 995, 997 (N. D. Ga.).

[*] Petitioner admitted that it uniformly placed the guarantee of "Prior endorsements" upon all checks presented to the Treasury for payment (R. 9).

Unlike the count based upon payment under mistake, the cause of action for breach of an express guaranty of prior endorsements sounds strictly in contract; what the defendant did with the money received in return for his guarantee is not material.[8] Here, in reliance upon petitioner's express guaranty of the genuiness of prior endorsements, the United States paid out $18,060.83. A prior endorsement proved to have been forged, and the guarantee therefore became operative, and the damages are the sum paid by the Government. The situation is simply that of breach of a written contract, for which the United States paid a valuable consideration. Cf. *Home Ins. Co.* v. *Mercantile Trust Co.*, 219 Mo. App. 645, 284 S. W. 834. However, as in the *Clearfield* case (318 U. S. at 368), it is unnecessary to select one theory of recovery since all applicable theories support recovery from petitioner.

[8] Cf. Aigler, *Cases on Negotiable Paper and Banking* (1937), p. 555n: "On such questions [the effect of negligence and change of position] it may be important whether the plaintiff's action is purely quasicontractual or is grounded on a warranty found perhaps in the term of the defendant's indorsements." The observations in *United States* v. *Guaranty Trust Co.*, 293 U. S. 340, 349, that "The express guarantee of prior endorsements means no more than what is implied by every unrestricted endorsement," must be read in the context of the facts, which involved a presenting bank that had title to the instrument under the applicable foreign law. Because of that factor, denial of recovery against the presenting bank avoided circuity of action. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367.

II

UNDER BOTH THE FEDERAL RULE AND THE OVERWHELMING WEIGHT OF STATE AUTHORITY, THE DRAWEE OWES NO DUTY TO A PRESENTING BANK TO PREVENT OR DISCOVER FORGERY OF THE PAYEE'S ENDORSEMENT

Petitioner's other principal contention is that the Government's lack of due care in issuing the checks and in failing to discover the forgeries and fraud constitutes a defense to the instant suit. The court below rejected this contention on the authority of its prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59,[19] in which it had relied primarily upon *United States* v. *National Exchange Bank*, 214 U. S. 302. We submit that this ruling was correct on both authority and reason, since under the almost universally accepted rule a drawer-drawee owes no duty to transferees of the check to exercise diligence either in issuing it or in discovering a forgery of the payee's signature thereon.

[19] The sole factual difference between the *Washington Loan & Trust* case and the instant case, is that there the faithless Government employee prepared the fraudulent vouchers in the name of fictitious and nonexistent employees. But that difference is of no significance, since the agent drawing the checks thought the payees to be existing. See n. 26, p. 38, *infra*.

A. THE FEDERAL RULE [11]

United States v. *National Exchange Bank*, 214 U. S. 302, is pertinent here. There the issuance of 194 Government pension checks to some existing and some dead payees was procured during a period of about ten years by means of fraudulent and forged vouchers which were accepted as genuine by the Government, although its records would unquestionably have permitted discovery of the frauds at some point short of ten years (see 214 U. S. 305). There was thus the same lack of diligence in issuing checks against fraudulent vouchers as is charged here. Again, as in the present case, the endorsements of the payees were forged on each check and the checks were regularly cashed by the National Exchange Bank of Providence, which forwarded them to the National Bank of the Republic of Boston for collection. The latter presented the checks to the Assistant Treasurer of the United States at Boston, and received the amount thereof (214 U. S. 304, 309–310). Suit was brought against the Exchange Bank to recover the amounts thus paid.[12] The defendant contended that "the United States had been negli-

[11] See n. 6, p. 11, *supra*.

[12] Although the United States originally brought suit against the presenting bank (National Bank of the Republic), it later amended its action and substituted as defendant the Exchange Bank of Providence, apparently upon the theory that the presenting bank was not liable since it was acting as a disclosed agent of the Exchange Bank and did not

gent in not verifying the signatures of the payees of the checks in suits by comparing them with signatures of the payees in its possession" (214 U. S. at 305); that the United States was under a duty "to discover the forgeries promptly after payment" (214 U. S. at 311), and, because of the information in its records, was chargeable with knowledge of the payees' identity, continued existence, true signatures, and right to receive the checks (214 U. S. at 318). (Cf. the contention urged by petitioner here, Br. p. 7.)

This Court unanimously rejected those contentions and held that the United States owed no duty to the cashing bank to discover the fraud and forgeries, and was not chargeable with knowledge of the facts regarding the issuance of the checks and the placing of the payees' signatures thereon.[12] Adverting to the procedure prescribed by the Government for the preparation and certification of the vouchers pursuant to which the checks were issued, the Court added (214 U. S. at 318–319):

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represent itself to be the owner of the checks. That rule had already been enunciated at the time suit was instituted. See cases cited, p. 13, *supra*.

[12] The *Exchange Bank* case also stands for the proposition that it was not a condition precedent to suit that prompt notice of the discovery of the forgery be given by the drawee. It was with this aspect of the case that this Court was primarily concerned in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363.

> These requirements are incompatible with the assumption that the Government was chargeable with knowledge of the identity, continued existence, and right to pensions, or with the signatures of those entitled to receive pension moneys. The requirement by the Government of proof, for its own protection, affords no ground for the contention that as to any action taken as the result of the furnishing of such proof the Government is estopped as to third parties from showing that the proofs furnished were false and fraudulent and that the Government had been deceived thereby. To so hold would be to say that from the act of exerting a precaution against fraud there arose a presumption by which the fraud could be successfully accomplished. This would be the case if it were now held that because by forged vouchers the Government was deceived into acting third parties had a right to rely upon the integrity of the proof and to estop the Government as though representations as to the verity of such proof had been made by it to such third parties. The rights, therefore, of the bank as the apparent acquirer of the pension checks are to be governed by the nature and character of the instruments and cannot be enlarged so as to relieve the bank from the obligation of warranty implied in the presentation of the checks and the collecting of the amount.

Since the Court held that the drawer-drawee owed no legal duty to the cashing bank to pre-

vent or discover the fraud in the issuance of the checks and the forgery of the payees' signatures thereon, the lack of due care in this respect could not constitute legal negligence as against the bank.[14] Safeguards analogous to those discussed in the *Exchange Bank* case surround the issuance of the checks involved here (R. 12–13); those safeguards, which petitioner invokes here (Pet. Br. pp. 7, 8, 11), were intended for the Government's benefit, and are not available to petitioner as a defense merely because the precautions failed to achieve their purpose. *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703, 704–705 (C. C. A. 2), affirming 39 Fed. 259, 261 (N. D. N. Y.); cf. *United States* v. *Kirkpatrick*, 9 Wheat. 720, 736–767. Any other rule would achieve the absurdity of charging the Government with the signatures of the payees upon some 290,000,000 checks which it now issues annually—a chargeability expressly denied in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369.

The Federal courts, almost without exception, have permitted recovery against the cashing or presenting bank although the negligence of the drawer in failing to discover or prevent a fraud

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[14] Cf. *Insurance Co.* v. *Fourth Nat. Bank*, 12 F. (2d) 100, 102 (N. D. Ga.), where the drawer negligently failed to discover the fraud and Judge Sibley observed:

"* * * A discovery by the insurance company of the fraud would probably have led to discovery of the forgery of the indorsements, but it owed no duty to the bank to discover either. Its only duty was to complain after actual discovery of the forgery."

in the issuance of checks plainly contributed to their subsequent forgery; since neither the drawer or the drawee was thought to owe a duty to the presenting or cashing bank promptly to discover the forgery of an endorsement, failure to do so was no defense.[15] And the court below, in its prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. (2d) 59, explained as follows that aspect of this Court's decision in the *Exchange Bank of Providence* case (134 F. (2d) 61–62):

> In such a state of facts the Supreme Court held that the bank, in paying the forged checks, acted wholly upon the apparent genuineness of the instruments and the responsibility of those presenting them, that the Government, in the circumstances, was not charged with knowledge of its

[15] *Ladd & Tilton Bank* v. *United States*, 30 F. (2d) 334, 338 (C. C. A. 9); *Security Savings Bank* v. *First National Bank*, 106 F. (2d) 542, 545, 546 (C. C. A. 6); *United States* v. *National Bank of Commerce*, 205 Fed. 433, 436–437 (C. C. A. 9); *Insurance Co.* v. *Fourth Nat. Bank*, 12 F. (2d) 100, 102 (N. D. Ga.); *District Nat. Bank* v. *Washington Loan & Trust Co.*, 65 F. (2d) 831, 833 (App. D. C.); *City Bank* v. *Hamilton National Bank*, 108 F. (2d) 588 (App. D. C.); *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2). Cf. *National Metropolitan Bank* v. *Realty Appraisal & Title Co.*, 47 F. (2d) 982 (App. D. C.), and *Continental Nat. Bank & Trust Co.* v. *Olney Nat. Bank*, 33 F. (2d) 437, 438–439 (C. C. A. 7), applying the rule to actions by drawer against drawee. In the majority of these cases, not only was there lack of care in the issuance of checks but also in failing to discover forgeries which continued over an appreciable period of time.

> payees' signatures, and that, consequently, its failure to detect the forgeries did not estop it from recovery. In other words, the failure of the Government to detect the fraud, though due to negligence, was not the cause of the loss, since in the whole transaction the Government and the bank dealt at arm's length, and the primary obligation of the bank to see to the genuineness of the endorsements continued throughout.

While recovery may be precluded when the drawee's negligence is of an affirmative character and directly and proximately affects the conduct of the cashing or presenting bank, there is here neither claim nor showing that petitioner was induced by any conduct of the United States to present the check and collect its proceeds and turn them over. Petitioner undoubtedly relied upon the responsibility of the Anacostia Bank and its express guaranty of the genuineness of the payee's signature (Cf. *City of New York* v. *Bronx County Trust Co.*, 261 N. Y. 64, 72–73; *National Bank of Commerce* v. *Fish*, 67 Okla. 102, 104, but this could give petitioner recourse only against that bank, not a defense against the drawee which paid the money to petitioner.

A rule thus uniformly applied to private drawer-drawees may *a fortiori* be available to the United States,[16] but in any event the United

[16] Ordinarily the negligence of its officers and servants does not preclude the United States from recovery from sureties

States as drawee of commercial paper owes no greater duty to third persons than does any other drawee (*cf. Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367–369). Petitioner contends (Br. p. 8), "that Government checks differ from private checks in that they can be expended only in compliance with statutory law and in banking circles they pass virtually on the basis of currency," and urges that the only risk which banks should be asked to bear in regard to forgery of the payee's signature on Government checks, is that of the loss or theft of the check. Such arguments were long ago rejected by this Court in *Smoot's Case*, 15 Wall. 36, 45–46:

> There is in a large class of cases coming before us * * * a constant and ever recurring attempt to apply to contracts made by the government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great government, prompt-

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and guarantors even when private litigants would be barred. *United States* v. *Hartford Accident & Indemnity Co.*, 117 F. (2d) 503, 505 (C. C. A. 2); *Hunter* v. *United States*, 5 Pet. 173, 187–188; *Hart* v. *United States*, 95 U. S. 316, 318. The rule has been applied to the negligence of state officers touching negotiable paper, *New Amsterdam Casualty Co.* v. *Albia State Bank*, 214 Iowa 541.

> ing appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. * * *
>
> It would be very dangerous, indeed, to the best interests of the government— * * *—if, adopting the views so eloquently urged by counsel, that court, or this, should depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual.

Petitioner characterizes the checks here involved as "false checks" (Br. pp. 5, 9, 10), apparently with the view to excepting them from the settled rule permitting recovery of payment made under a false endorsement. Such an argument is footless. The checks were signed by duly authorized disbursing officers of the United States and were made payable to existing persons to whom the disbursing officers believed the United States to be indebted. Had these checks been endorsed by the named payees themselves, a subsequent holder in due course, under the universally accepted rule, could have enforced payment against the United States despite the fraudulent inducement of their issuance. See Brannan, *op. cit. supra*, n. 3, at pp. 599, 685. The fact that the checks were issued pursuant to fraudulent vouchers had no other effect upon the checks than to afford a defense to the United States in a suit by

the payees or by transferees who were not *bona fide* purchasers for value without notice.[16] The fallacy of petitioner's argument is demonstrated by the numerous cases where the United States has recovered payments made on forged endorsements although the issuance of the check was procured by fraud.[17]

The overwhelming weight of authority in the state courts is in accord with the federal rule that the drawer's negligence in preventing or discovering fraud and forgery does not bar recovery of payments made under a forged endorsement.[18]

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[16] *United States* v. *National Exchange Bank*, 214 U. S. 302; *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); *Farmers' State Bank* v. *United States*, 62 F. (2d) 178 (C. C. A. 5); *Washington Loan and Trust Co.* v. *United States*, 134 F. (2d) 59 (App. D. C.). The same rule is, of course, applicable to checks issued by private persons. See cases cited in note 18, *infra*.

[17] *Los Angeles Investment Co.* v. *Home Savings Bank*, 180 Cal. 601, 610; *U. S. Storage Co.* v. *Central Bank*, 343 Ill. 503, 513; *National Metropolitan Bank* v. *Realty Appraisal & Title Co.*, 47 F. (2d) 982, 984 (App. D. C.); *State Bank of Chicago* v. *Mid-City Trust and Savings Bank*, 232 Ill. App. 186, 190–191; *United Workmen* v. *Bank*, 92 Kan. 870, 888–889; *Jordan Marsh Co.* v. *National Shawmut Bank*, 201 Mass. 397, 407, 408; *American Sash and Door Co.* v. *Commerce Trust Co.*, 332 Mo. 98, 110; *City of St. Paul* v. *Merchants National Bank*, 151 Minn. 485, 488; *Shipman* v. *Bank of New York*, 126 N. Y. 318, 329; *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26, 32; *Commonwealth* v. *Globe Indemnity Co.*, 323 Pa. 261, 267; Brannan, *op. cit.*, *supra*, n. 3, p. 331.

Most of the above cases involved suits by a drawer against the drawee, but the rule applies *a fortiori* in respect of a suit against a collecting bank. A drawer owes some duty of care

Efforts to amend the Negotiable Instruments Law to give the presenting bank a defense in situations such as the instant case have so far been successful in only four states.[19]

B. THE RULE IS SOUND IN POLICY

Strong considerations of policy support the almost universal rule that the drawer owes no duty to protect one who voluntarily cashes a check against the forgery of the payee's signature. No one is compelled to cash a check or to accept an endorsement; and the endorsee who does not know the payee and is not satisfied with the genuineness

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to the drawee, but the drawee and the collecting bank deal at arm's length in respect of the payee's endorsement. *Sprague v. West Hudson County Trust Co.*, 92 N. J. Eq. 639, 642.

[19] The amendment sponsored by the American Bankers Association (27 Ill. L. Rev. 564; 14 Notre Dame Lawy. 126) would change Section 9 of the Act (dealing with situations in which an instrument would be considered as payable to bearer) to read as follows:

"Third. When it is payable to the order of a fictitious or nonexistent or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee."

It has been adopted in Illinois (*Houghton Mifflin Co. v. Continental Bank*, 293 Ill. App. 423); Idaho (Code, 26-109); Montana (Rev. Code, § 8416); and Massachusetts (Acts 1941, c. 215). The amendment has never had the support of the Commission on Uniform State Laws, see Beutel, *The N. I. L. Should Not Be Amended*, 80 U. of Penna. L. Rev., 368, 377, *et seq.* A bill, H. R. 3513 (78th Cong., 1st Sess.), to amend the Code of Laws of the District of Columbia to comport with the amendment sponsored by the American Bankers Association, has thus far not been reported out of committee, so far as we know.

of the endorsement can and usually will decline to accept it or to pay out money on the strength of it. Similarly, where a check is submitted to a bank for cashing by an alleged endorsee of the payee (as in the case at bar), the bank is not required to cash the check; if it does, it relies not upon any representations which could be derived from the fact of the check's issuance, but upon the responsibility and integrity of the person tendering the instrument to it. See *White* v. *Continental National Bank*, 64 N. Y. 316, 320–321. Checks are not likely to be cashed for an unidentified stranger, regardless of the reputability of the other names on the paper as drawer or payee. And conversely, checks drawn by an unknown maker upon an unknown drawee and endorsed by an unknown payee, will readily be accepted by banks which know and are willing to rely upon the person who tenders and endorses the check for deposit or cash. For these reasons one who pays out money on a check is not concerned with the circumstances of its issuance, nor with what precaution against forgery the drawer may have taken before or after emitting the check. If the payee's endorsement is forged and loss occurs it was the "neglect or error" of the cashing or collecting bank "in accepting the forger's signature which occasions the loss." *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 370.

Were a contrary rule to obtain, facts unknown to a cashing bank and upon which it did not and could not rely would enable it to evade the expected result of its mistaken reliance upon the integrity or responsibility of those with whom it deals. If a check payable to the order of a named payee is stolen or lost and the endorsement forged, the loss unquestionably falls upon him who accepts the endorsement and thereafter negotiates the paper or collects it. The situation is outwardly no different where the issuance of the check is procured by fraud and the payee's signature forged; in both cases the drawer's direction that the drawee should pay to the order of a designated person, or the drawer-drawee's intention so to pay, has not been satisfied; and in neither case did any conduct of the drawer mislead the casher. Moreover, to give the cashing bank the benefit of circumstances which had no bearing upon the bank's election to accept the check would merely bestow a windfall upon it. It could not count on the defense of the drawer's failure to adopt adequate precautions; hence, the bank would have to take identical precautions in all cases—i. e., to satisfy itself of the responsibility of the tenderer of the check, or to identify the payee's signature. If the facts should later prove to involve some negligence on the part of the drawer, the cashing bank would unfairly be afforded the benefit of something which was of no concern to it and which was not taken into account when it accepted the check.

All these considerations are equally pertinent to a collecting bank. Such a bank normally has no knowledge of the genuineness of the payee's endorsement and has no facilities for inquiring into it; it relies solely upon its confidence in the responsibility of the person who has endorsed the check to it. The collecting bank has no concern with the circumstances surrounding the issuance of the checks, and obviously does not rely upon or speculate as to whether the drawer might have been negligent in issuing the check or in discovering a fraud. It is upon this basis that the business of banks is conducted. *City of New York* v. *Bronx County Trust Co.*, 261 N. Y. 64, 72; *McKinnon* v. *Boardman*, 170 Fed. 920, 922 (C. C. A. 2). If the endorsement of the payee is subsequently discovered to be forged, collecting banks merely charge the account of the prior endorser with whom they dealt. They suffer no loss unless the prior (genuine) endorsers are insolvent, in which event it is the latter's financial irresponsibility which causes the loss and not the fact that there may have been negligence on the part of the drawer before or after the issuance of the check.[20]

The rule contended for by the petitioner would destroy the certainty of rights and liabilities which give to checks their value as instruments of credit and payment. Drawers would be unwilling to risk the free use of checks if the result

[20] We understand that it is customary for banks having a large collection business to insure against loss by forgery.

of any negligence, however slight, were to render the paper payable to bearer, contrary to its designation as order paper. See Kessler, *Forged Indorsements,* 47 Yale Law Journal 863. Because "negligence" is an elastic concept, the inability to predict the conclusion of a court or jury would introduce an element of uncertainty in negotiable paper that might well seriously affect its use. Moreover, since the task of investigating the circumstances under which each check was issued is an impossible burden which no bank could undertake, it would have to assume that the risk of forgery would fall upon itself, and would fix its interest rates, discount charges, and other practices accordingly. The avoidance of the result of that risk because of the fortuitous and irrelevant circumstances of the drawer's negligence would then merely give the bank the undeserved benefit of a defense upon which it did not and could not count. For these reasons, the person accepting an endorsed check and paying out cash thereon is bound at his peril to ascertain that the endorsements are genuine. *American Security Company* v. *Empire Trust Company*, 262 N. Y. 181. And, as already noted, this duty is not unduly onerous since the endorsee need merely decline to accept the instrument unless satisfied with the genuineness of prior signatures or with the responsibility of the endorser. Weighed against the serious threat to the desirability and free use of negotiable paper which the

contrary rule would entail, the prevailing rule is mild in the requirement it imposes upon cashing and collecting banks—that they rely upon those with whom they deal, in accordance with the usual banking and commercial practice.

These considerations were excellently summed up by the Court of Appeals of New York in *Gallo* v. *Brooklyn Savings Bank*, 199 N. Y. 222, 226, 92 N. E. 633, 634 (1910):

> Corporations, some of them numbering their stockholders by thousands, and usually ignorant of their identity and signatures, pay their dividends by checks to the orders of the various stockholders, transmitted by mail, relying on their right to reclamation from the banks in case the checks have been indorsed or collected by persons not entitled thereto. So also, a person will send by post to the most distant part of the country his check to the order of another person to whom he wishes to pay or transfer money, confident in the knowledge that the abstraction of the check can entail no loss on him. On the continent of Europe a different rule prevails, and payment by the drawee to a party presenting the same, of a bill drawn to order, is valid, even though the indorsement is forged, provided the drawee acts in good faith and without negligence. In England the common-law rule prevailed as to bills (but not as to checks) until the Bills of Exchange Act of 1882, which adopted the continental rule as to sight bills, but

not as to time bills, though a limited protection against forgery of the name of the payee may be had by "crossing".[21] Such a rule would render the present business methods of this country impossible. Although at times banks have complained of the harshness of our rule, and in some instances while acting in good faith have been subjected to severe loss (*Shipman* v. *Bank of the State of N. Y.*, 126 N. Y. 318, 27 N. E. 371, 12 L. R. A. 791, 22 Am. St. Rep. 821), as a result of this rule banks are used by all classes of our people for the deposit of funds and payment is made by check to an extent unknown elsewhere. Of course a party entitled to the receipt of money may insist upon its payment in cash and not by check.

C. THE DECISION IN UNITED STATES *v.* CHASE NATIONAL BANK, 252 U. S. 485, IS NOT PERTINENT

Petitioner bases its argument almost exclusively upon an alleged identity between the facts in this case and those in *United States* v. *Chase National Bank*, 252 U. S. 485 (Pet. Br. pp. 14–15, 19), and contends that it is not equitably obligated to

[21] It is the undoubted law of England, however, that the presenter of the check is liable to the drawer although the latter's vouchering clerk fraudulently supplied the name of a payee not entitled to have any interest in the check, as in the case at bar. Compare *Clutton* v. *Attenborough & Son*, (1897) A. C. 90, and *Vinden* v. *Hughes*, (1905) 1 K. B. 795, 801–802, with *Bank of England* v. *Vagliano Bros.*, (1891) A. C. 107. See also *Macbeth* v. *North & South Wales Bank* v. *Macbeth*, (1908) 1 K. B. 13, 17, affirmed, (1908) A. C. 137.

refund the money (Br. p. 10). We submit that the *Chase National Bank* case is not applicable, since there the drawer's signature was forged, justifying application of the familiar doctrine of *Price* v. *Neal*, 3 Burr. 1354 (1762), that the drawee who pays in such a situation cannot recover the payment. And contrary to petitioner's interpretation, the decision there did not turn either on equitable considerations or on the circumstance that the check was unlawfully issued.

In the *Chase Bank* case, a finance clerk in the United States Army fraudulently drew a check upon the Treasurer of the United States, forging the name, as drawer, of an Acting Quartermaster authorized to draw checks. The check was made payable to the order of the drawer, and the faithless employee also forged the drawer's signature as the payee's endorsement, then cashing the check at the Howard National Bank. That Bank endorsed and forwarded the check to the Chase National Bank for collection, and the latter received payment from the Treasurer. In a suit brought to recover the payment, the district court gave judgment for the defendant on the ground that in the circumstances the check was payable to bearer (241 Fed. 535), and the Circuit Court of Appeals for the Second Circuit affirmed on the same ground (250 Fed. 105). This Court in turn affirmed, but in reliance upon the rule of *Price* v. *Neal*, 3 Burr. 1354, which holds the drawee charge-

able with knowledge of the drawer's signature and hence bound by acceptance or payment even if that signature is forged. Under that rule, this Court held that the United States was estopped, after acceptance, to deny the forgery of the drawer's signature (252 U. S. at 494). The added forgery of the payee's signature was held not to have placed the drawee in any worse position than resulted from its acceptance of the forged signature of the drawer (252 U. S. at 496). This was merely an application of the doctrine of *Price* v. *Neal*, for a drawee who is charged with knowledge of the drawer's signature can also be charged with knowledge of the payee's signature, where drawer and payee are one.

Moreover, the *Chase Bank* case was solely an action for the recovery of money paid by mistake; it was not combined, as was the instant case, with an action for breach of an express guaranty of the genuineness of prior endorsements; nor could it have been based upon the implied warranty of title.[22]

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[22] The cashing bank had endorsed the check specially to the order of the Chase Bank and had guaranteed restrictive endorsements only (252 U. S. at 491); but inasmuch as there were no restrictive endorsements, such a guaranty came to nothing. Cf. *Planters' Bank & Trust Co.* v. *Union Trust Co.*, 56 Ohio App. 309, 322, 335. The Chase Bank gave no guaranty of prior endorsements but merely receipted for payment. Since the Chase Bank was a depositary of public moneys and was acting as a fiscal agent of the United States

That nothing in the *Chase Bank* case would operate as a defense where, as here, recovery is sought from a collecting bank for breach of an express guaranty of prior endorsements upon a check upon which the payee's but not the drawer's signature was forged, may be gathered from the virtually solid body of Federal decisions permitting recovery after the *Chase Bank* decision, and following the rule in the *Exchange Bank* case (see cases cited p. 22, n. 15, *supra*). The ruling in the latter case, that the exceptional rule of *Price* v. *Neal* cannot be extended to cases of fraud in the issuance of checks or forgery of the payee's endorsement (214 U. S. at 317),[23] has recently been adverted to with approval. See *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369.

(cf. R. S. 5153, 12 U. S. C. 90), it may be questioned if a warranty of title could be implied. The warranty of title aspect of the case was disposed of with the observation that no one had a better title than the collecting bank (252 U. S. at 493). That observation could not apply where the check was signed by an authorized disbursing officer and made payable to an existing payee intended to receive the proceeds, as was true of the checks in the case at bar.

[23] The Court declared (214 U. S. 317):

"* * * To apply the rule, however, to the Government and its duty in paying out the millions of pension claims, which are yearly discharged by means of checks, would require it to be assumed that that was known, or ought to have been known, which on the face of the situation was impossible to be known, would besides wholly disregard the relation between the parties and would also require that to be assumed which the obvious dictates of common sense make clear could not be truthfully assumed."

D. THE DECISION IN UNITED STATES *v.* FIRST NATIONAL BANK OF CHICAGO IS ERRONEOUS AND SHOULD BE DISAPPROVED

The only case holding that the United States is under a duty to prevent or discover fraud in the issuance of checks and the forgery of their endorsements is *United States* v. *First National Bank of Chicago*, 138 F. (2d) 681 (C. C. A. 7),[24] the conflict of which with the decision below led to United States not to oppose the granting of certiorari here. That case arose under peculiar circumstances. There the United States sued the collecting bank to recover on 22 pension checks issued between 1927 and 1934 to the order of a payee who the issuing officer in the Pension Bureau did not know was dead, although the Veterans Bureau, which had no connection with the pension checks or the Pension Bureau, had paid a statutory allowance for the payee's burial. The court held that the United States was chargeable with the knowledge of the payee's death, and hence with knowledge of the forgery;[25] that the

[24] Petitioner, although it alleged a conflict with the *First National Bank of Chicago* case as a ground for certiorari (Pet. 7), does not rely upon that case in its brief filed herein. There is dictum to the same effect in *Security-First National Bank* v. *United States*, 103 F. (2d) 188, 191 (C. C. A. 9). If this dictum still retains vitality after the decision of this Court in the *Clearfield Trust Company* case (318 U. S. at 366), it has no firmer basis than the holding in the *First National Bank* case.

[25] Although no statute or regulation required the Veterans Bureau to transmit information of this character to the Pension Bureau, the court presumed the existence of such a duty

United States was negligent in not giving notice of the forgery to respondent as soon as the Veterans Bureau learned of the payee's death; and that the bank, having suffered an intervening loss of recourse against prior endorsers as to 18 checks, was exonerated on that ground. Cf. *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 370.[26]

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because a reasonably prudent businessman would have taken that precaution. The Court completely ignored the other precautions—not available to businessmen—which the United States had taken to prevent forgery of a dead payee's signature to pension checks: the requirement that all postmasters, delivery clerks, or letter carriers who learn of the death of a pensioner must return the letter containing the pension check with a suitable notice of the death of the payee. Act of August 17, 1912, c. 301, 37 Stat. 311, 312, as amended by the Act of June 3, 1936, c. 482, 49 Stat. 1396 (38 U. S. C. 50).

[26] The C. C. A. rejected, *sub silentio*, the argument that the checks were payable to bearer because the drawer of the checks was chargeable with the knowledge of the death of the payee. While that might have been a more logical disposition of the case, nothing else appearing, the court was confronted with its own prior decision in *Continental Nat. Bank & Trust Co.* v. *Olney Nat. Bank*, 33 F. (2d) 437, 439, that it was the intention of the drawer which controlled and that a check drawn to a nonexistent payee is payable to bearer only if the drawer knew he was nonexistent. That decision followed the accepted rule. *Robertson Banking Co.* v. *Brasfield*, 202 Ala. 167, 168; *Los Angeles Investment Co.* v. *Home Savings Bank*, 189 Cal. 601, 606; *Fletcher Am. Nat. Bank* v. *Crescent Paper Co.*, 193 Ind. 329, 340–341; *U. S. Storage Co.* v. *Central Bank*, 343 Ill. 503, 511; *Harmon* v. *Old Detroit Nat. Bank*, 153 Mich. 73, 78–79; *City of St. Paul* v. *Merchants National Bank*, 151 Minn. 485, 488–489; *Shipman* v. *Bank of New York*, 126 N. Y. 318, 330;

In respect of the remaining four checks on which the defendant had not lost its right of recourse, the court held that the Government's negligence was so gross as to preclude the United States from recovering on the forged endorsements.

As to the four checks on which the defendant bank had not lost its right of recourse, the decision is in effect a ruling that the United States is under a duty to the collecting bank to investigate

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Armstrong v. *National Bank*, 46 Ohio St. 512, 521; *Joseph Milling Co.* v. *First Bank of Joseph*, 109 Ore. 1, 18; *Commonwealth* v. *Globe Indemnity Co.*, 323 Pa. 261, 266. As was remarked in *Seaboard National Bank* v. *Bank of America*, 193 N. Y. 26, 33, "Such intention to be effective must necessarily arise from knowledge and exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery."

The court also rejected, *sub silentio*, the contention that the United States was estopped to assert the forgery because under §§ 61 and 62 of the N. I. L., the drawer warrants the existence of the payee and his capacity to endorse. Such obviously is not the federal rule. *United States* v. *National Exchange Bank*, *supra*; *Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); *United States* v. *First National Bank of Coffeyville*, 82 Fed. 410 (D. Kan.). Nor do §§ 61 and 62 of the N. I. L. stand for that proposition. Drawers and acceptors may admit the existence of the payee and his capacity to endorse but not that the payee *will* endorse, or has in fact endorsed, or that an unauthorized endorsement will be accepted as the payee's. *American Express Company* v. *Peoples Savings Bank*, 192 Ia. 366; *Robertson Banking Co.* v. *Brasfield*, 202 Ala. 167; *Ocean Accident & Guaranty Corp.* v. *Lincoln National Bank*, 112 N. J. L. 550; *National Union Fire Insurance Company* v. *Mellon Bank*, 276 Pa. 212; 90 *University of Pennsylvania Law Review*, 973; see 22 *Boston U. Law Review*, 336, 340. At most,

its records for the purpose of ascertaining whether the payee's signature has been forged. That holding is clearly out of line with the weight of authority. *United States* v. *National Exchange Bank, supra; Onondaga County Savings Bank* v. *United States*, 64 Fed. 703 (C. C. A. 2); see also cases cited p. 22, n. 15, and p. 26, n. 18, *supra*. Absent any such duty, the court was plainly wrong in holding that the negligence of the United States in issuing the checks precluded recovery.

In respect of the 18 checks as to which recourse had been lost, the decision, based upon the imputation of knowledge of the payee's death to the drawer, is equally unsound, for the officer specially charged with the duty of giving notice of the discovery of the forgery was the Treasurer of the United States. 31 C. F. R. § 202.34. Neither that official nor his subordinates had actual knowledge of the death of the payee nor of the existence of any forgery; hence, the duty of the United States to give prompt notice of the *discovery* of a forgery upon penalty of loss of rights against the collecting bank, if its right of recourse is lost in the meantime (*Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 369–370), could never become operative. In *Cooke* v. *United*

§ 61 of the N. I. L. "estops plaintiff from denying the existence of the payees but does not estop plaintiff from proving that the signatures of the payees were forged" (*Dorsey* v. *Manhattan Co.*, 33 N. Y. Supp. (2d) 69, 74).

States, 91 U. S. 389, this Court declining to impute to the Treasurer the knowledge of an Assistant Treasurer that the drawer's signature had been forged, said (at p. 398):

> Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect. But this cannot happen until the officer specially charged with the duty, if there be one, has acted, or ought to have acted.

The rationale of the *Clearfield* case is that prompt notice to the collecting bank that forgery had been discovered would have prevented loss to that bank by permitting it to seek recourse against the forwarding bank in time; but one can not be required to give notice of a fact of which he has no actual knowledge. Since imputation of knowledge in such circumstances is tantamount to the imposition of a duty to find out, the practical effect of the decision in the *First National Bank of Chicago* case is to hold the United States liable for failure of the officer specially charged to discover the forgery. This, as we have pointed out above, runs counter to the great weight of authority, both federal and state.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment should be affirmed.

CHARLES FAHY,
Solicitor General,
FRANCIS M. SHEA,
Assistant Attorney General,
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DECEMBER 1944.

APPENDIX

GENERAL COUNSEL,
TREASURY DEPARTMENT,
Washington 25, December 6, 1944.

Re: *United States* v. *National Metropolitan Bank*; re reclamation on checks cashed by James F. Foley on forged endorsement.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

MY DEAR MR. SHEA: In response to your informal request concerning the method employed in respect to endorsement of checks presented for payment to the Treasury, the following is the ordinary procedure:

Where a check is presented by a bank, it is customary to require that the bank guarantee the genuineness of all prior endorsements. If a check were found by the Treasurer to have been presented without this guarantee, payment would be declined.

Very truly yours,
[Signed] NORMAN O. TIETJENS,
Assistant General Counsel.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

No. 161.—October Term, 1944.

National Metropolitan Bank, a Corporation, Petitioner, *vs.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 8, 1945.]

Mr. Justice Black delivered the opinion of the Court.

One Foley, a civilian clerk in the Paymaster's office of the Marine Corps, procured the issuance of 144 government checks, duly signed by the authorized disbursing officials, by forging pay and travel mileage vouchers in the names of living Marine Corps officers. These forgeries occurred during a period of twenty-eight months, beginning shortly before July 14, 1936, and ending November 16, 1938. The checks were drawn on the United States Treasury payable to the order of the officers and delivered to Foley for distribution to them. Foley forged their endorsements, added his own name as second endorser, and deposited or cashed the checks at the Anacostia Bank. That bank, without investigating the genuineness of the payees' signatures, endorsed the checks and transmitted them to the petitioner bank, which collected on them from the government. Both banks specifically guaranteed prior endorsements. About November 21, 1938, the government discovered the fraud and the forgeries, and on December 8th formally demanded repayment from the petitioner. Repayment was refused. On August 11, 1942, the government brought this suit in the District Court to recover the payments made. The complaint contained two counts, one for breach of express warranty, and one for money paid under a mistake of fact. The bank filed an answer in which it admitted that it had collected the moneys for the account of the Anacostia Bank after presenting the checks to the government with its stamped endorsement guaranteeing prior endorsements. As defense it set up the following: (1) the endorsement did not amount to a guaranty of the payee's signature; (2) issuance of the checks by the government was a war-

ranty that they were not "fictitious", but genuine and issued for a valuable consideration, and this warranty was breached; (3) the government's disbursing agencies neglected properly to supervise and examine the transactions both before and after the first and succeeding checks were issued, thereby delaying discovery of the fraud, and this neglect, not the bank's guaranty, caused the government's loss. The District Court granted the government's motion for judgment on the pleadings, and the Court of Appeals affirmed, 142 F. 2d 474, on the authority of its own prior decision in *Washington Loan & Trust Co.* v. *United States*, 134 F. 2d 59 (1943). Because of a conflict with *United States* v. *First National Bank*, 138 F. 2d 681, (C. C. A. 7, 1943), we granted certiorari.

Only recently, in *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, we had occasion to consider rights and liabilities of the government which stem from the issuance and circulation of its commercial paper. Our conclusion was that legal questions involved in controversies over such commercial papers are to be resolved by the application of federal rather than local law and that, in the absence of an applicable Act of Congress, federal courts must fashion the governing rules. Some of the questions petitioner argues here are foreclosed by the *Clearfield* decision. There we held that presentation of a government check to it for payment with an express guaranty of prior endorsements amounts to a warranty that the signature of the payee was not forged but genuine. Breach of that warranty, we said, by presenting a check on which the payee's signature is a forgery, gives the government a right to recover from the guarantor when payment is made. The checks in the instant case were presented to the government by the bank bearing forged endorsements of the payee's name, and a specific guaranty by the bank. Under the *Clearfield* rule, therefore, the government should recover, unless other principles here invoked exempt it from liability.

It is contended that had it not been for negligence of the government's administrative officers in detecting the frauds of its clerk, some, if not all, of the checks would not have been issued, and that neither the government nor the bank would have suffered any loss. The answer alleged facts which, if true, did show negligence in failing to discover the frauds, and since judgment was entered on the pleadings without trial, we must treat the

case as though negligence in this respect had been established. This question as to the effect of the drawer-drawee's negligence prior to a specific guaranty of endorsements was not directly involved in our *Clearfield* case; it was an issue in *United States* v. *National Exchange Bank*, 214 U. S. 302, a case on which we largely drew for the principles announced in the *Clearfield* decision. In the latter case, we pointed out that the *National Exchange Bank* case stood for the rule that prompt discovery of fraud was not a condition precedent to suit in cases like this. The *National Exchange Bank* case presented a situation where 194 government checks had been issued over a period of ten years as a result of forged vouchers. There as here, proper examination and supervision by government officials would have uncovered the frauds and thereby prevented or reduced the loss. The collecting bank defended there as here on the ground that the government's failure to discover the fraud should absolve the collecting bank from liability. This Court, applying the general law merchant, rejected the defense. The rule there applied, as pointed out by the court below in *Washington Loan & Trust Co.* v. *U. S.*, *supra*, has been almost unanimously accepted by State and federal courts. No persuasive reasons have been suggested to us why it should not be accepted as the general federal rule.

Rejection of the defense of the government's negligence here set up does not, as petitioner argues, conflict with this Court's holding in *United States* v. *Chase National Bank*, 252 U. S. 485. In that case the government brought suit against a bank to recover payment it made of a government draft which was itself a forgery. The name of the payee was also forged. Recovery was denied because the instrument was a forgery. The holding rested on a long established exception to the general rule under which one who presents and collects a valid commercial instrument with a forged endorsement can be compelled to repay. The reason for the exception is that a drawee is required to be familiar with a drawer's signature; if therefore the drawee pays to an innocent presenter on a forged drawer's signature, it has been held that the drawee's right to the money is not superior to that of the innocent presenter. *Price* v. *Neal*, 3 Burr. 1354. This exception is not applicable here because the signatures of the drawer on these checks were genuine while those in the Chase National Bank controversy were forged. The fact that these

checks were induced by fraud does not bring them within the reasoning of the Chase National Bank rule.

There is nothing here to support the petitioner's contention that the government's conduct in issuing the checks prompted it to guarantee the payee's endorsement. Such a guarantee no more results from the issuance of government checks than any other checks. Government regulations concerning payment of its commercial paper point the other way. Treasury Regulations have made guarantee of prior endorsements a prerequisite to payment. 31 C. F. R. 202.33. This guaranty was a protection which the government sought not only as to checks which were issued in due course for a valuable consideration, but as to checks which might have been irregularly issued. That the administrative officers failed fully to perform their duty is no reason why the government should be deprived of the advantage of a guarantee independently made by one who was not under compulsion of any kind to make it. No equitable principles require that one who, for his own reasons, guarantees a payee's signature after issuance of a check, shall be relieved of his voluntarily assumed obligation because others who owed the government obligations had previously defaulted in their obligations.

We do not say that there may not be some circumstances, not now before us, under which the government might be precluded from recovery because of conduct of a drawer prior to a guaranty of endorsement. We do hold that negligence of a drawer-drawee in failing to discover fraud prior to a guaranty of the genuineness of prior endorsements does not absolve the guarantor from liability in cases where the prior endorsements have been forged.

Affirmed.

Mr. Justice Douglas concurs in the result. Mr. Justice Murphy took no part in the consideration or decision of this case.